IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT NASHVILLE
Assigned on Briefs December 10, 2002

STATE OF TENNESSEE v. PAUL BILES

Appeal from the Circuit Court for Warren County
No. F-8358 Charles D. Haston, Judge

No. M2002-00459-CCA-R3-CD - Filed May 2, 2003

The defendant, Paul Biles, was convicted of aggravated robbery, see Tenn. Code Ann. § 39-13-402(a)(1), and unlawful carrying of a weapon, see Tenn. Code Ann. § 39-17-1307(a)(1). The trial court imposed concurrent sentences of eleven years and thirty days, respectively. In this appeal of right, the defendant asserts (1) that the trial court erred by admitting certain evidence and (2) that the sentence for aggravated robbery is excessive. The judgments of the trial court are affirmed.

Tenn. R. App. P. 3; Judgments of the Trial Court Affirmed

GARY R. WADE, P.J., delivered the opinion of the court, in which JERRY L. SMITH and JAMES CURWOOD WITT, JR., JJ., joined.

L. Scott Grissom, Assistant District Public Defender, for the appellant, Paul Biles.

Paul G. Summers, Attorney General & Reporter; Christine M. Lapps, Assistant Attorney General; and Dale Potter, District Attorney General, for the appellee, the State of Tennessee.

OPINION

On September 13, 2001, the defendant and his co-defendant, Jason Cox, entered the Pit Stop East, spoke briefly with the clerk, Vander Maxwell, and then demanded money from the cash register. When Maxwell refused to cooperate, the defendant unplugged the cash register and carried it out the front door.

At trial, Maxwell testified that the defendant and "a white man," later identified as Jason Cox, entered the store at approximately 6:00 p.m. and stayed for approximately forty-five minutes. He recalled that while both the defendant and Cox demanded that he open the register, only Cox pointed a weapon at him. Maxwell testified that he could see the outline of a gun under the defendant's shirt. He testified that after he refused to open the cash register, the defendant went behind the counter, unplugged the register, and "toted it out the front door." Maxwell stated that the defendant placed the register in a white van, which was driven by Cox. After the robbery, Maxwell telephoned the

police and provided them with the license number and a description of the van. During cross-examination, Maxwell denied having encouraged the defendant to rob the store as a means of revenge against the owner.

Jason Cox, who had entered a plea of guilty to the aggravated robbery charge, testified that he was alone at his residence drinking and "eating pills" on the day of the offense when the defendant arrived. He claimed that they left the residence and went "cruising around." According to Cox, they drove to the defendant's brother's residence where the defendant got a gun "to do some target practice shooting." After acknowledging that he was carrying his own gun on the day of the offense, Cox refused to answer any other questions, asserting his right to remain silent under the Fifth Amendment. Even after the trial court informed Cox that because he had pled guilty, he no longer possessed a right to remain silent with regard to the robbery of the Pit Stop East, Cox refused to answer any questions. After the trial court granted the state's request that Cox be declared a hostile witness, the prosecutor asked Cox several questions from his statement to police, wherein he claimed that the defendant planned the robbery. Cox admitted giving the statement, but claimed that he lied in order to gain his release. After taking the cash register, Cox and the defendant drove into the woods, where the defendant shot at it until it opened. The contents were divided between the two men. During cross-examination, Cox testified that he thought that the clerk was a participant in the robbery plan.

Officer Derwin Adcock of the McMinnville Police Department, who was assigned to investigate the robbery, testified that Maxwell identified the defendant from a photographic lineup. Later, the defendant was arrested driving a white van matching the description provided by Maxwell. Officers discovered a gun and ammunition under the driver's seat of the van. The defendant admitted his participation in the robbery and implicated Cox, but claimed that the robbery was Maxwell's idea.

The defendant testified that because he was a regular customer of the Pit Stop East, he had a number of conversations with Maxwell prior to the robbery. He claimed that Maxwell often complained about the way he was treated by the store's owner and encouraged him to rob the store as a means of revenge against the owner. The defendant denied carrying a weapon on the night of the robbery and insisted that Cox was unarmed. He contended that he was "cutting up with [Maxwell], laughing," when he walked behind the cash register and started pushing buttons in an attempt to open it. The defendant claimed that Maxwell waited on several customers before the cash register was unplugged and carried out of the store. He and Cox then drove to a secluded area where the defendant opened the register by shooting it with his gun. According to the defendant, it contained between $700 and $800. The defendant admitted getting a gun while at his brother's residence but insisted that he took it to clean and repair. He denied using it in the robbery.

I

The defendant asserts that the trial court erred by permitting the state to read into evidence the statement that Cox had given to the police after his arrest. The state submits that the trial court properly allowed Cox to be impeached with the prior inconsistent statement and that the instruction

provided by the trial court during the general charge prevented the jury from considering its contents as substantive proof of the crime.

Tennessee Rule of Evidence 607 provides that "the credibility of a witness may be attacked by any party, including the party calling the witness." One method of attacking credibility is through the use of prior inconsistent statements of the witness. See Tenn. R. Evid. 613; Neil P. Cohen et al., Tennessee Law of Evidence, § 613.1 at 405-06 (3d ed. 1995 & Supp. 1998). Rule 607 "permits impeachment by either party so long as the questioning is not a pretext for putting inadmissible hearsay before the jury." State v. Timmy Fulton, No. 02C01-9706-CC-00223 (Tenn. Crim. App., at Jackson, April 21, 1998). A party may not, however, call a witness to testify for the primary purpose of introducing a prior inconsistent statement that would otherwise be inadmissible. Mays v. State, 495 S.W.2d 833, 837 (Tenn. Crim. App. 1972). Impeachment cannot be a "mere ruse" to present to the jury prejudicial or improper testimony. State v. Roy L. Payne, No. 03C01-9202-CR-00045 (Tenn. Crim. App., at Knoxville, Feb. 2, 1993).

The trial court informed Cox that because he had already entered a plea of guilt, he could not assert his Fifth Amendment rights with regard to his participation in the robbery of the Pit Stop East. When he continued to refuse to answer questions, the trial court threatened to hold him in contempt, to which Cox responded, "What [penalty] does it carry, sir?" Cox refused to answer any questions about the defendant's involvement, saying, "I will not testify against Mr. Biles. I was not notified of being a witness against Mr. Biles, and I will not do it." The trial court declared Cox a hostile witness and the prosecutor questioned him extensively from the statement he had given to police shortly after his arrest. Throughout the questioning, Cox claimed that he had falsified the prior statement because police promised that he would be released if he provided a statement incriminating the defendant. Although the trial court did not provide a contemporaneous instruction informing the jury that it could consider Cox's statement only for impeachment purposes, it did provide such an instruction as part of the general charge.

In our view, the state followed the proper procedure for impeaching a witness by the use of a prior inconsistent statement. See Tenn. R. Evid. 613. Cox admitted making the statement but insisted that its contents were false. While much of its content was read aloud as part of the state's questioning, the statement itself was never admitted into evidence. Cox's assertion that the pretrial statement was false establishes its inconsistency. Further, while the better procedure is to provide a contemporaneous instruction, see Martin v. State, 584 S.W.2d 830, 833 (Tenn. Ct. App. 1979), the trial court did instruct the jury to consider the statement only for impeachment purposes. Jurors are presumed to follow the instructions. See State v. Smith, 893 S.W.2d 908, 914 (Tenn. 1994); State v. Woods, 806 S.W.2d 205, 211 (Tenn. Crim. App. 1990). Thus, any error would qualify as harmless. See Tenn. R. App. P. 36(b); Tenn. R. Crim. P. 52(a).

II

The defendant next asserts that his sentence is excessive. When there is a challenge to the length, range, or manner of service of a sentence, it is the duty of this court to conduct a de novo review with a presumption that the determinations made by the trial court are correct. Tenn. Code

Ann. § 40-35-401(d). This presumption is "conditioned upon the affirmative showing in the record that the trial court considered the sentencing principles and all relevant facts and circumstances." State v. Ashby, 823 S.W.2d 166, 169 (Tenn. 1991); see State v. Jones, 883 S.W.2d 597, 600 (Tenn. 1994). "If the trial court applies inappropriate factors or otherwise fails to follow the 1989 Sentencing Act, the presumption of correctness falls." State v. Shelton, 854 S.W.2d 116, 123 (Tenn. Crim. App. 1992). The Sentencing Commission Comments provide that the burden is on the defendant to show the impropriety of the sentence. Tenn. Code Ann. § 40-35-401, Sentencing Commission Comments.

Our review requires an analysis of (1) the evidence, if any, received at the trial and sentencing hearing; (2) the presentence report; (3) the principles of sentencing and the arguments of counsel relative to sentencing alternatives; (4) the nature and characteristics of the offense; (5) any mitigating or enhancing factors; (6) any statements made by the defendant in his own behalf; and (7) the defendant's potential for rehabilitation or treatment. Tenn. Code Ann. §§ 40-35-102, -103, -210; State v. Smith, 735 S.W.2d 859, 863 (Tenn. Crim. App. 1987). If the trial court's findings of fact are adequately supported by the record, this court may not modify the sentence even if it would have preferred a different result. State v. Fletcher, 805 S.W.2d 785 (Tenn. Crim. App. 1991).

In calculating the sentence for a Class B, C, D, or E felony conviction, the presumptive sentence is the minimum in the range if there are no enhancement or mitigating factors. Tenn. Code Ann. § 40-35-210(c). If there are enhancement but no mitigating factors, the trial court may set the sentence above the minimum, but still within the range. Tenn. Code Ann. § 40-35-210(d). A sentence involving both enhancement and mitigating factors requires an assignment of relative weight for the enhancement factors as a means of increasing the sentence. Tenn. Code Ann. § 40-35-210(e). The sentence must then be reduced within the range by any weight assigned to the mitigating factors present. Id.

As a Range I offender convicted of aggravated robbery, a Class B felony, the defendant faced a potential sentence of between eight and twelve years. See Tenn. Code Ann. § 40-35-112(a)(2). In fixing the term at eleven years, the trial court applied the following enhancement factors:

> (1) The defendant has a previous history of criminal convictions;
> (2) the defendant was a leader in the commission of the offense;
> (10) the defendant had no hesitation about committing a crime when the risk to human life was high; and
> (16) the crime was committed under circumstances under which the potential for bodily injury to a victim was great.

See Tenn. Code Ann. § 40-35-114(1), (2), (10), (16) (1997). The trial court determined that while there were applicable mitigating factors, including the defendant's fifteen years of military service and steady employment history, see Tenn. Code Ann. § 40-35-113(13), those factors, under the circumstances, were entitled to little weight.

The defendant asserts that the trial court erred by applying enhancement factors (10), that the defendant had no hesitation about committing the crime where the risk to human life was high, and (16), that the potential for bodily injury to a victim was great, because they are inherent in the offense of aggravated robbery. The state submits that enhancement factor (10) was applicable because there was a risk to the life of persons other than the victim and that enhancement factor (16) was applicable because of the danger created by the fact that Cox was intoxicated and carrying a firearm during the robbery.

In our view, the record supports the application of enhancement factor (10), because, as indicated by the trial court, the robbery endangered the lives of the other customers that were in the store. Our supreme court has recently held that enhancement factor (10) may be used to enhance a sentence where there is a risk to the lives of persons other than the victim. See State v. Imfeld, 70 S.W.3d 698, 707 (Tenn. 2002).

The defendant is correct that factor (16) generally cannot be used to enhance a sentence for aggravated robbery because the offense of aggravated robbery necessarily entails a high risk of bodily injury. See State v. Claybrooks, 910 S.W.2d 868, 872-73 (Tenn. Crim. App. 1994). This court has previously held that there is always a great potential for bodily injury whenever a deadly weapon is used in the commission of a crime. See State v. Hill, 885 S.W.2d 357, 363 (Tenn. Crim. App. 1994). In consequence, the trial court should not have used factor (16) to enhance the sentence. See Tenn. Code Ann. § 40-35-114 (1997). Nevertheless, it is our view that the remaining factors are sufficient to warrant the eleven-year sentence, one year less than the maximum.

Accordingly, the judgments of the trial court are affirmed.

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GARY R. WADE, PRESIDING JUDGE